In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-346

WILLIAM N. ANDERSON, ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were improperly charged with and convicted of a conspiracy under 18 U.S.C. 241;[1] they argue that the conspiracy neither affected a federal election nor involved state action within the intendment of the statute.

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioners,

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[1] 18 U.S.C. 241 provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same * * *
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> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

all of whom were state officials,[2] were convicted of having conspired together and with others to injure and oppress the rights of voters to have their votes properly counted, by stuffing the ballot box with illegal ballots during a West Virginia primary election, in violation of 18 U.S.C. 241. Each was sentenced to ten years' imprisonment. The court of appeals affirmed in a lengthy opinion (Pet. App. A; 481 F. 2d 685).

On May 12, 1970, a Democratic primary election was held in Logan County, West Virginia, for the purpose of nominating candidates for federal and local offices, including the Democratic seat on the Logan County Court, for which incumbent Okey Hager was running. Hager's major opponent was Neal Scaggs. The Hager ticket included not only local candidates but nominees for the United States Senate and House of Representatives.

The evidence showed that, prior to the election, petitioners and others conspired to gain control of the Mount Gay precinct—a small but potentially crucial precinct in the election—to insure the nomination of Okey Hager. Promising money and various political favors, and in at least one instance threatening prosecution, petitioners convinced three of the five election officials who operated the Mount Gay precinct to cast illegal votes on the voting machines and then to destroy the poll slips[3] so it could not be determined (except from the machine

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[2] William Anderson was the Clerk of the County Court of Logan County; John Browning was Clerk of the Circuit Court of that county; Earl Tomblin was the Sheriff of Logan County, and Ernest "Red" Hager was one of his deputies; W. Bernard Smith was a State Senator from the Seventh Senatorial District.

[3] Poll slips are consecutively numbered records reflecting the name of each person who actually voted at a particular precinct. See W. Va. Code, ch. 3, art. 1, §22.

tally) how many persons actually voted (*e.g.*, Tr. 342-350, 621-623, 626-634).[4] Cecil Elswick, Calvin Napier, and Janet Sullins, the three election officials who participated in the illegal scheme, testified at trial that, pursuant to this preconceived plan, illegal votes were placed on the voting machines at the Mount Gay precinct which benefited all the candidates on the Hager ticket (*e.g.*, Tr. 356-357, 638-640). After the votes were machine tabulated, Elswick removed the poll slips to his automobile and later threw them in a river (Tr. 643-645).

While only about 250 to 275 persons actually voted at the Mount Gay precinct, the election returns showed a total of 401 persons to have voted (Tr. 358).[5] County Court incumbent Okey Hager allegedly received 294 votes, and challenger Neal Scaggs 67 votes. The county-wide totals in the Hager-Scaggs County Court race, including the fraudulent Mount Gay votes, gave Hager 5,258 votes and Scaggs 5,237.

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[4] "Tr." refers to transcript of the proceedings in the trial court, a copy of which is lodged herewith.

[5] At the time of the election, the records of the Logan County Court listed 541 persons as eligible to vote at the Mount Gay precinct (Gov't Exhibits 1, 4A, 4B). Of that number, 88 testified at the trial that they did not vote in the election, and it was agreed that 134 other persons whose names were read to the jury were registered voters at the Mount Gay precinct who, if called as witnesses, would have testified that they did not vote in the election. Nine registered voters were dead at the time of the election, two were in the hospital, and two were in prison. (Tr. 43-80, 107-121, 129-200, 264-337, 506, 812-820). Thus, at least 235 registered voters did not go to the polls at Mount Gay on May 12, 1970. In addition, eighteen registered voters in that precinct voted by absentee ballot (Tr. 83), which left a maximum of 288 registered Mount Gay voters who could have gone to the polls in this election, and a maximum of 306 who could have voted. This established beyond question that the reported figures were fraudulent.

Following the primary, the results of the Hager-Scagg County Court race were contested in the Logan County Court; contestant Hager sat as one of the two presiding officers in that proceeding. Evidence presented at trial in the instant case showed that petitioners perjured themselves and solicited several other witnesses to testify falsely at the election contest, in a continuing effort to have the illegal votes counted and certified (*e.g.*, Tr. 650-653, 656-659, 668-669, 994-996).

Testimony in the election contest was concluded on August 25, 1970. The County Court was required by statute to rule on the contest by September 17, 1970.[6] That court failed, however, to enter a final order within the statutory period; indeed, it never officially decided the election contest. Scaggs appealed to the Logan County Circuit Court, which, pursuant to West Virginia law, eliminated the entire vote results of the Mount Gay precinct; the effect of that decision was to render Scaggs the nominee. The matter was then taken to the Supreme Court of Appeals of West Virginia, which, on October 21, 1970, ruled that the circuit court had no jurisdiction to act with regard to the contest. *State ex rel. Hager* v. *Oakley*, 177 S. E. 2d 585. As a result, the Mount Gay votes, which included those illegally cast, were counted, and Okey Hager was nominated for the County Court seat in dispute.

1. Petitioners contend that they were improperly charged with a federal offense under 18 U.S.C. 241, because the primary purpose of the conspiracy was to cast fraudulent votes for a purely local candidate. The election, however, involved both local and federal candidates. Where, as here, local and federal candidates are

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[6] See W. Va. Code, ch. 3, art. 7, §7.

joined on a common slate, and the evidence shows that the illegal activities affected the number of votes cast for federal as well as local candidates, the fact that petitioners were concerned primarily with the outcome of the local election does not limit federal jurisdiction. Moreover, contrary to petitioners' assertion, the fact that the federal election results were not actually altered is of no relevance here. It is long settled that

> The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States. [*Fields* v. *United States,* 228 F. 2d 544, 547 (C.A. 4), certiorari denied, 350 U.S. 982.]

Petitioner's claim, in any event, is not well taken. We rely upon the thorough reasoning of the court below to show that, contrary to petitioners' contentions, 18 U.S.C. 241 does apply to interference with local elections if such interference involves state action (Pet. App. 19a-24a). See *United States* v. *Guest,* 383 U.S. 745; *United States* v. *Price,* 383 U.S. 787. In *Reynolds* v. *Sims,* 377 U.S. 533, 554-555, it was stated:

> [T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. * * * The right to vote can neither be denied outright * * * nor diluted by ballot-box stuffing * * *.

As the court below pointed out (Pet. App. 23a-24a; 481 F. 2d at 700):

> It is * * * not necessary that the "involvement of the State be either exclusive or direct"; it may be merely "peripheral". *United States* v. *Guest, supra* (383 U.S. at 755). Nor is it essential that the state official be a party defendant; it is sufficient if the proof involves "a charge of active connivance by agents of the State" in wrongful acts done in furtherance of the conspiracy; that will meet the test of state action, as required under the rule enunciated in *Guest*. [Citation omitted]
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> *Guest* and *Reynolds* read together, it seems to us, compel the conclusion that a conspiracy by the defendants with which the official election managers connived, in order to dilute through "ballot-box stuffing" the constitutionally protected right of suffrage, as is claimed here, is within the broad language of Section 241, and this is true whether the conspiracy is directed at an election for a state or a federal office, for which the election clerks and managers were essential cogs in the conspiracy. Without their active participation, the conspiracy was ineffective, both at the election itself and in the election contest. The depositing of false ballots in the ballot box required their connivance. The listing of the names of fictitious voters on the voting list had to be done by or with the cooperation of the election clerks. And, when the election contest developed, it was necessary for the election officials and the defendants to "stick[ing] together and tell[ing] the same story" [sic], as certain of the election officials testified without objection they were instructed to do by the defendants just before the election contest hearing.

Thus, whether their conspiracy is viewed as one which affected a federal election or as one by state officials to affect a local election, petitioners in this case violated 18 U.S.C. 241.[7]

2. Noting that the indictment here does not specifically state *in haec verba* that petitioners acted "under color of state law" or that their activities involved "state action" (Pet. 9), petitioners claim alternatively that the indictment failed to allege the requisite state action. The indictment did, however, allege that the conspiracy affected both the federal and local vote results and necessarily involved state officials (see Pet. App. 3b); it alleged the office held by each of the petitioners (Pet. App. 1b); and it specified that they acted together and with others to interfere with the right of qualified voters "to vote for candidates for the aforesaid offices and to have such vote cast, counted, recorded, and certified at their full value and given full effect as aforesaid" (Pet. App. 3b). Those portions of the indictment, taken together, sufficiently allege state action. Cf. *United States* v. *Guest, supra,* 383 U.S. at 756-757; *United States* v. *Price, supra,* 383 U.S. at 799-800.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[7] In view of this Court's decisions in *Reynolds, Guest* and other Fourteenth Amendment cases, the antiquated lower court decisions cited by petitioners (Pet. 5-6), insofar as they suggest a more limited scope to 18 U.S.C. 241, cannot be regarded as good law.

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